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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

JEANNE WOODFORD, Warden, California State Prison at San Quentin, *Petitioner,*

v.

COLLEEN MARY ROHAN ex rel. OSCAR GATES, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
MORRIS BEATUS
Deputy Attorney General
[Counsel of Record]
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5846
Fax: (415) 703-1234
Counsel for Petitioner

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QUESTIONS PRESENTED

Considering the limited purpose of federal habeas corpus proceedings, and Congress's policy of deference to state-court determinations, does the statutory right to capital habeas counsel under 21 U.S.C. § 848(q)(4)(B) entitle a petitioner to an indeterminate stay of habeas proceedings because of his present mental incompetence, when his claims were fully exhausted in state court and there has been no factual determination that his present ability to communicate with counsel is essential to present those claims in federal court?

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PETITION FOR WRIT OF CERTIORARI

Jeanne Woodford, Warden, California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals for the Ninth Circuit, App. A, is reported at 334 F.3d 803 (9th Cir. 2003). The order of the district court denying a stay of capital habeas corpus proceedings and certifying the issue for interlocutory appeal is unreported. App. B.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 25, 2003. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

21 U.S.C. § 848(q)(4)(B) provides:

> In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

STATEMENT OF THE CASE

In 1979, Oscar Gates ("Gates") committed a murder during a robbery, by shooting two family members, one fatally, at their home in Oakland, California. Evidence presented at the penalty phase included prior convictions for robbery, rape, and kidnaping, as well as an assault, robbery, and killing in Los Angeles for which Gates was later convicted. Defense evidence at the penalty phase showed that Gates was "good-natured" and, according to a psychologist, "well adjusted." Gates was sentenced to death. App. A at 3. The judgment was affirmed on direct appeal. *People v. Gates*, 43 Cal. 3d 1168 (1987). After his conviction and sentencing, Gates began acting uncooperatively and irrationally, eventually filing more than a

hundred habeas petitions and asserting bizarre claims. App. A at 3.

In 1988, Gates sought federal habeas corpus relief. The district court appointed counsel in 1989 pursuant to 21 U.S.C. § 848(q)(4)(B), which authorizes the appointment of counsel for a prisoner challenging a death penalty judgment on federal habeas corpus. Since 1990, Gates's mental competence has been litigated in federal court. App. B at 33-34. In 1994, the district court found Gates mentally incompetent and appointed Respondent, Colleen Rohan ("Rohan"), an attorney, to serve as Gates's "next friend" for federal habeas proceedings and "to act for Mr. Gates and make appropriate decisions on his behalf[.]" App. B at 36. Rohan filed an amended federal petition with unexhausted claims in 1995. It led to a return to the California Supreme Court, which denied habeas relief in 2000, and the filing of a second amended habeas corpus petition in the federal district court. In that federal habeas petition, Rohan sought to stay federal habeas proceedings because Gates was mentally incompetent. App. B at 34-35. In 2001, the district court refused to stay proceedings, concluding:

> [P]etitioner's argument . . . appears to reflect an attempt to import trial-level constitutional safeguards – such as, the right to effective assistance of counsel and competency to stand trial – into federal habeas proceedings. The role of federal habeas review is not to re-try the original trial, however, but instead is limited to review for federal constitutional error . . . . Ordinarily, the best evidence of any constitutional error at trial will be the trial record itself. Thus, given the more limited review of federal habeas, and the fact that resolution of many claims will not necessitate any input from the inmate, there is no justification for staying federal habeas proceedings in their entirety simply because the inmate cannot

> communicate with federal habeas counsel and possibly provide information that might strengthen some of the claims in the petition or give rise to other claims. [¶] The Court invited a submission from petitioner setting forth the claims where Mr. Gates's input would be material and describing the type of information Mr. Gates might be available to provide. On August 6, 2001, petitioner submitted such information. Without revealing the content of that submission, it can be described as fairly general. Accordingly, at the present time, and on the present record, the Court finds that a stay of these proceedings is not warranted.

App. B at 46-47. The district court certified the issue for interlocutory review under 28 U.S.C. § 1292(b). App. B at 51-52.

The Ninth Circuit Court of Appeals accepted jurisdiction and, on June 25, 2002, reversed on the ground that petitioner's inability to rationally communicate with his attorney deprived him of his right to assistance of counsel under 21 U.S.C. § 848(q)(4)(B). The court held that "where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally, refusing to stay proceedings pending restoration of competence denies him his statutory right to assistance of counsel, whether or not counsel can identify with precision the information sought." App. A at 26-27. The panel found that result "dictate[d]" by *Calderon v. U.S. Dist. Court* (*Kelly*), 163 F.3d 530 (9th Cir. 1998) (en banc), *overruled in unrelated part by Woodford v. Garceau*, __ U.S. __, 123 S.Ct. 1398, 155 L. Ed. 2d 363 (2003). App. A at 29-30. In *Kelly*, the Ninth Circuit ruled a condemned prisoner's mental incompetence tolled the federal habeas corpus statute of limitations because a petitioner's statutory right to counsel depends on his ability to communicate rationally, and

if mental incompetence prevents rational communication then his statutory right to counsel would be "eviscerate[d]," and effectively denied. App. A at 18-19, *citing Kelly*, 163 F.3d at 541.

The Ninth Circuit concluded that if Gates is incompetent and habeas proceedings are not stayed, he would be unable to rationally communicate any "private knowledge" to counsel to support or corroborate existing claims. App. A at 26. The panel also noted an inability to disclose information could affect "an entirely new claim," given the statutory limitations on second or successive petitions, 28 U.S.C. § 2244(b)(2), which might prevent habeas counsel's use of that information in a future, second petition. App. A at 16. For its holding that a stay was required, the panel looked to this Court's per curiam decision in *Rees v. Payton*, 384 U.S. 312, 314-15 (1966) (*Rees I*), and the subsequent summary order in *Rees v. Payton*, 386 U.S. 989 (1967) (*Rees II*), staying habeas proceedings in a capital case in which a condemned habeas petitioner had sought to withdraw a certiorari petition against the advice of his attorneys. App. A at 20-21.

In deciding to stay proceedings, the court of appeals rejected the district court's conclusion that Gates's counsel needed to offer more than a "fairly general" submission about the areas requiring Gates's rational participation. App. A at 24. The Ninth Circuit ruled: "Requiring counsel to identify with particularity what petitioner would tell them were he competent, rather than merely the general areas where he could potentially assist, sets an unrealistically high bar under the circumstances." App. A at 24-25.

REASONS FOR GRANTING CERTIORARII.

CERTIORARI IS REQUIRED TO MAKE CLEAR THAT FEDERAL HABEAS CORPUS PROCEEDINGS CANNOT BE DELAYED BECAUSE OF THE HABEAS PETITIONER'S PRESENT MENTAL INCAPACITY, WITHOUT A DETERMINATION THAT PETITIONER'S APPOINTED COUNSEL CANNOT PRESENT THE EXHAUSTED CLAIMS FROM THE EVIDENCE AND MATERIALS DEVELOPED AND PRESENTED IN THE STATE COURTS

Oscar Gates, who is acting through a next friend, has been found by the district court to be unable to communicate rationally with his appointed attorney in this capital federal habeas corpus proceeding. No factual determinations were ever made that Gates's mental incompetence impairs the presentation of exhausted federal habeas claims or that his current ability to communicate with his attorney is essential to present those claims. Indeed, the district court found to the contrary. App. A at 5-6.

Nevertheless, the Ninth Circuit ordered the federal habeas proceedings stayed during Gates's incompetency, suspending indefinitely a presumptively valid state conviction for murder and sentence of death. The court's ruling threatens to freeze similar federal habeas proceedings everywhere in the Ninth Circuit, in every case where the habeas petitioner is presently unable to communicate with counsel — without regard to the fact that the petitioner's claims have already been fully exhausted in state court post-conviction proceedings, and without any evidentiary determination that the current appointed counsel is unable to present those same claims based on the

investigation, evidence, and other materials that were developed in the state-court proceedings. The decision creates confusion about the scope of federal habeas corpus, suggesting it acts as a forum for the discovery and development of information not previously known or presented to the state courts. Finally, the decision creates another stage of capital federal habeas corpus litigation: a mental competency determination on whether to stay proceedings, regardless of whether petitioner's competency is in fact necessary to resolve pending, exhausted claims. The court of appeal's decision thus undermines this Court's admonition that federal habeas is not "a means by which a defendant is entitled to delay an execution indefinitely." *Barefoot v. Estelle,* 463 U.S. 880, 887 (1983).

Accordingly, this Court should provide guidance about the effect of a capital petitioner's mental incompetence on the scope and function of federal habeas review.[1/]

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1. The federal habeas corpus petition in this case was filed before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, §§ 104, 110 Stat. 1218. Although the terms of the AEDPA do not govern this case, its objectives "inform" this Court's review. *See Calderon v. Thompson*, 523 U.S. at 554, 558 (regardless whether statute governs, court of appeals must exercise its discretion "in a manner consistent with" the AEDPA's objectives; AEDPA's provisions "'certainly inform our consideration'" of whether appellate court abused its discretion) (quoting *Felker v. Turpin*, 518 U.S. 651, 663 (1996)).

A. The Ninth Circuit's Ruling Permits Unreasonable Delay of Federal Habeas Corpus Proceedings Under the Guise of a Statutory Right to Competent Representation That Falsely Assumes Communication Needs of Appointed Counsel in Federal Proceedings Are Equivalent to Those of Trial Counsel or of Counsel in State Post-conviction Proceedings

The Ninth Circuit unreasonably equated the kind of communication needed by appointed counsel under 21 U.S.C. § 848(q)(4)(B) with the kind of communication needed by trial counsel or by counsel in state post-conviction proceedings. The appellate court thus created a standard of "competence" for the assistance of federal habeas counsel that is measured according to the needs of trial counsel or state post-conviction counsel to investigate and develop evidence. That standard finds no justification in the limited purpose of federal habeas corpus proceedings.

Acknowledging that there is no Sixth Amendment right to assistance of counsel in federal habeas corpus proceedings, "effective or otherwise," App. A at 12, the court of appeals nevertheless concluded that considerations of due process favor *inferring* a right to competent assistance of capital habeas counsel from Congress's creation of the statutory right to counsel in 21 U.S.C. § 848(q)(4)(B). App. A at 17. The court determined that, as a matter of law, the assistance of counsel in federal habeas corpus proceedings cannot be said to be "competent" or "meaningful" unless the petitioner and his attorney can engage in rational communication:

> [I]f meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to meaningful assistance of counsel, it follows that

> Congress' mandate cannot be faithfully enforced unless courts ensure that a petitioner is competent.

App. A at 17.

But the reasoning is unsound, given the court's false premise that the "capacity for rational communication is *essential* to meaningful assistance of counsel" in federal habeas proceedings. Unlike a trial, federal habeas corpus proceedings are limited to consideration only of claims that have already been presented and exhausted in state-court post-conviction proceedings. *Rose v. Lundy*, 455 U.S. 509 (1982). Accordingly, in the absence of proof that counsel appointed under 21 U.S.C. § 848(q)(4)(B) cannot meaningfully present fully exhausted claims — despite the availability of all of the evidence, arguments, and materials developed during the state-court appeal and post-conviction proceedings — it cannot be said as a matter of law that the habeas petitioner's present capacity for rational communication is *essential* to meaningful assistance of counsel in federal habeas corpus proceedings.

The court of appeals reached a contrary position based on its own circuit law, which holds that a capital petitioner's mental incapacity to rationally communicate with habeas counsel tolls the habeas corpus statute of limitations because, absent tolling, his statutory right to counsel would be denied. App. A at 18-19 (citing *Kelly V*, 163 F.3d at 541). The underlying premise is that without the ability to rationally communicate with counsel, regardless of any factual determination about the subject matter or the need for the communication, petitioner would be deprived of the effective assistance of counsel to which he is entitled. *See* App. A at 9 (citing *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996)).

Congress, however, implicitly rejected so broad a view by precluding ineffective assistance of habeas counsel as a basis for

delaying enforcement of a state capital judgment. Under 28 U.S.C. § 2261(e): "The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in *a capital case* shall not be ground for relief in a proceeding arising under section 2254." (Emphasis added.) Whereas counsel's ineffectiveness at trial is a basis of relief under the Sixth Amendment, *see United States v. Cronic*, 466 U.S. 648, 658 (1984); *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984), Congress barred relief for ineffective assistance in federal capital habeas proceedings. Congress clearly did so to prevent having habeas counsel's performance used to undermine the finality of the state judgment. Indefinitely suspending a death judgment, as the Ninth Circuit has done in this case, solely because the petitioner could not rationally communicate with counsel during habeas proceedings, regardless of whether a communication might be essential to present his exhausted claims, undermines finality no less.

This is not to say that Congress expressed an indifference to ineffective assistance of counsel. It imposed standards of professional experience to qualify an attorney for appointment as capital habeas counsel. 21 U.S.C. § 848(q)(5)-(7). Insofar as either the district court, the petitioner, or petitioner's appointed next friend is dissatisfied with counsel's performance, different counsel can be appointed "at any phase of the State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel." 28 U.S.C. § 2261(e). Those statutory provisions provide the sole remedy for ineffectiveness during federal habeas proceedings. *See also* 28 U.S.C. § 2254(i) (no ineffective assistance of collateral counsel claims available in non-capital federal habeas proceedings).

Accordingly, it is assumed that counsel is qualified and is effectively representing petitioner; and if there is dissatisfaction with counsel's performance, the sole remedy is replacement. Given the need for finality, and the limited, secondary nature of

the proceedings, such safeguards are sufficient to create a conclusive presumption of effective assistance in federal habeas proceedings. Congress did not intend the scope of representation to be what is expected at trial – that is, the communication and development of speculative "private information" from a defendant. Because federal habeas corpus proceedings are limited to review of exhausted claims based on the record made in the state courts, the duties of appointed counsel under 21 U.S.C. § 848(q)(4)(B) are more like those of appellate counsel than trial counsel. Congress recognized this important distinction in describing the qualifications of appointed habeas counsel: "If the appointment is made *after judgment*, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and *must have had not less than three years experience in the handling of appeals in that court in felony cases*." 21 U.S.C. § 848(q)(4)(B) (emphasis added).[2/]

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2. In contrast, consistent with the primary function of state courts as the forum in which to develop evidence, California rules and practice provide that a condemned prisoner is entitled to appointment of habeas corpus counsel "to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus." California Supreme Court Policies Regarding Cases Arising From Judgments of Death, 1-1. These state post-conviction proceedings are the vehicle by which the prisoner, represented by counsel, brings forth any newly discovered evidence casting fundamental doubt on the accuracy or reliability of the proceedings leading to his conviction. *See In re Clark*, 5 Cal. 4th 750, 766, 855 P.2d 720, 21 Cal.Rptr. 509 (1993).

B. The Ninth Circuit's Ruling Undermines the Proper Relationship Between State and Federal Courts in Reviewing State Convictions for Constitutional Infirmity

By threatening unreasonably to delay presumptively valid state judgments, the court's decision undermines core principles of finality, comity, and federalism. *See Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) ("Finality is essential to both the retributive and the deterrent functions of criminal law . . . . [T]he power of a State to pass laws means little if the State cannot enforce them") (internal quotation marks and citations omitted); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) ("The state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings"). The Ninth Circuit's refusal to distinguish between the role of trial counsel and the role of counsel in state post-conviction proceedings, on the one hand, and the role of counsel in federal habeas corpus proceedings, on the other, fosters continuing disregard for the limited nature of federal habeas review of state convictions.

Indeed, to justify its stay of proceedings here, the court of appeals baldly suggested that new, previously undisclosed evidence might later be introduced *for the first time* to support a claim of ineffective assistance of trial counsel. App. A at 26 (suggesting that when Gates regains his competence, he may disclose to counsel "private knowledge" concerning his mental capacity during trial and the competence of his trial counsel).

The "scope of the right to counsel" is defined by "a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson v. Illinois*,

487 U.S. 285, 288 (1988). The ultimate question in determining the role of counsel is what purpose can "a lawyer serve at the particular stage of the proceedings in question[.]" *Id.* A capital habeas petitioner does not need, and is not entitled to, the same type of representation accorded a presumptively innocent criminal defendant who must defend against charges which require his ability to rationally consult with his attorney. Federal habeas corpus is not a device to raise new factual claims or, for the first time, substantial facts supporting old claims. See *O'Sullivan v. Boerkel*, 526 U.S. 838, 844 (1999) (state court is first forum to review claims and provide relief); *Keeney v. Tamayo-Reyes*, 504 U.S. at 9-10; *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 275-77 (1971); *compare Vasquez v. Hillery*, 474 U.S. 254, 260-61 (1986). Certiorari is warranted, therefore, to preserve the carefully crafted allocation of state-federal responsibilities from erosion under the guise of a need to ensure trial-type representation by counsel appointed under 21 U.S.C. § 848(q)(4)(B).

Ignoring core principles of comity and finality, the Ninth Circuit instead looked to the evolution of common law over the past three centuries in protecting a mentally incapacitated prisoner from execution. Particularly important in its analysis was the development of modern-day collateral proceedings as explained by Justice Powell in his concurrence in *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring). App. A at 10-13.

In that concurrence, Justice Powell formulated the test for determining competence of a prisoner to be executed. *Ford v. Wainwright* at 422. As later adopted by this Court, the execution standard requires only the prisoner's awareness of the punishment to be suffered and why he is suffering it. That standard for execution is lower than the trial standard, which requires an ability to consult with counsel with a reasonable degree of rational understanding, along with a rational and

factual understanding of the proceedings. *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989). Justice Powell explained that the execution standard should be lower because, historically, the condemned prisoner needed the ability to rationally communicate up to the last minute to prevent unjust execution, but as the legal process evolved, a prisoner received "more extensive review of convictions and sentences" than at common law, "including not only direct appeal but ordinarily both state and federal collateral review," with the "right to *effective* assistance of counsel at trial and on appeal . . . . It is thus unlikely indeed that a defendant today could go to his death with knowledge of undisclosed trial error that might set him free." *Ford v. Wainwright*, 477 U.S. at 420 (Powell, J., concurring; emphasis in original).

The Ninth Circuit misinterpreted Justice Powell's words to mean that the process as it has evolved requires a condemned prisoner to rationally communicate, apparently without limitation, in collateral proceedings for the same reasons the common law had required rational communication before the prisoner could be executed in the Eighteenth Century. App. A at 13. ("Indeed, Justice Powell specifically relied on the efficacy of collateral review among the reasons to discard the common law rational communication requirement at execution. . . . If anything, *Ford* reinforces the importance of competence to pursue collateral review because it removes common law safeguards at later stages of the process"). Justice Powell actually stated the opposite. He explained that in past times the execution occurred relatively soon after trial, and a defendant who was unable to communicate at execution was also likely to have been incompetent to stand trial. Because a defendant "must be competent to stand trial, . . . the notion that a defendant must be able to assist in his defense is largely provided for [at trial]." *Ford* at 421 (Powell, J., concurring). Accordingly, "a standard that focused on the defendant's ability to assist in his defense [in a collateral proceeding] would give

too little weight to the State's interest in finality, since it implies a constitutional right to raise new challenges to one's criminal conviction until sentence has run its course. Such an implication is false . . . ." *Id.* at 420-21, and n. 2.

C. The Ninth Circuit's Ruling Rests in Part on an Unwarranted Interpretation of this Court's Summary Order in *Rees v. Payton*

The Ninth Circuit found "persuasive" support in this Court's summary order in *Rees v. Payton*, 386 U.S. 989 (1967) (*Rees II*) for its conclusion that capital habeas corpus proceedings must be stayed where the condemned prisoner is found to be mentally incompetent. App. A at 21. The *Rees II* order[3] followed upon this Court's decision and remand in *Rees v. Payton*, 384 U.S. 312 (1966) (*Rees I*).

As a summary order, *Rees II* has dubious precedential value for any rule of law. *Cf. Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974). It is also factually distinguishable. This Court's earlier reasoned opinion in *Rees I* did not address the question presented below of whether a "next friend" and attorney can competently prosecute federal relief on behalf of a mentally incompetent condemned prisoner when the prisoner chooses to seek such relief. Rees never had a "next friend," as there is here, who would have had standing to pursue the certiorari

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3. The order states as follows: "This case is held without action on the petition until further order of the Court." *Rees II* at 989. In 1995, this Court issued a final order dismissing Rees's petition for writ of certiorari. *Rees v. Superintendent of Virginia State Penitentiary*, 516 U.S. 802 (1995). By that time, the death judgment had been void for 23 years in light of *Furman v. Georgia*, 408 U.S. 238 (1972), and Rees himself was already dead. App. A at 21 n. 8.

petition on behalf of a mentally incompetent prisoner. Years later, in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), this Court looked to *Rees I* for the test that a next friend must meet for standing to act on behalf of a condemned prisoner. In the death penalty post-judgment context, the Court ruled that under the standards of *Rees I*, a next friend could be appointed by showing that the condemned prisoner was suffering from a mental disease, disorder or defect that substantially affected his capacity to make an intelligent decision. *Whitmore* at 165-66. That test was met here in appointing Rohan as the next friend to pursue habeas proceedings on behalf of the mentally incompetent Gates. The court of appeals, however, using the summary order in *Rees II*, has turned *Rees I* on its head by finding that habeas proceedings cannot go forward because Gates is incompetent, thereby using the reason why a next friend was appointed to go forward as the reason to stay habeas proceedings.

In sum, the Ninth Circuit's decision freezes indefinitely presumptively valid state death penalty judgments whenever a condemned prisoner is found mentally incompetent in federal court proceedings, whether or not the petitioner's mental incapacity impairs the presentation of pending, exhausted claims. Ignored in the Ninth Circuit's decision are the purpose and function of state law and procedure, through trial, appeal, and post-judgment habeas review. Yet, absent the district court's factual determination that the petitioner's ability to rationally communicate with habeas counsel is essential to present exhausted federal claims, a stay of federal habeas proceedings adds nothing to the adequacy or purpose of federal habeas review. The Ninth Circuit's novel imposition of an unlimited mental competency requirement for federal habeas relief gravely undermines comity and finality. It is essential for this Court to intervene and provide the federal habeas courts with clear direction on this important question.

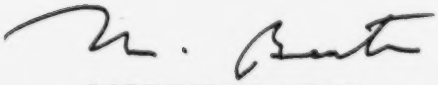
CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Dated: September 17, 2003

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General



MORRIS BEATUS
Deputy Attorney General
[Counsel of Record]

Counsel for Petitioner

MB/cfl
SF2001XF0002